Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT SAMUEL CHAPPELL,
Petitioner,
v.
LAWRENCE BARRERAS, Successor to
JOHN THOMAS, as Warden of New
Mexico State Penitentiary,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

pro se
BRIEF OF PETITIONER,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether structural defects, as defined in Brecht v. Abrahamson, 507 U.S. _____ (1993), can be barred from habeas corpus review in United States Courts, by a state's procedural rules, without offending both the Supremacy Clause, Article VI, Clause 2, and the Fifth, Sixth, and Fourteenth Amendments.

2. Whether a trial in a state court, with an under developed legal system, which has no subject matter jurisdiction, no ties of any kind to a non-resident alien can be procedurally barred from habeas corpus review, when jurisdiction exists under Title 28 U.S.C. §§ 2241 et sequence and under 2254, for consideration of such questions.

3. Whether cause and prejudice must be shown to excuse an alleged procedural bar which is chicanerously obtained without principles and which bar is not consistently applied and has been recently waived by the state's highest court where the bar allegedly occurred.

4. Whether United States Courts can be barred from enforcing the Interstate Agreement on Detainers, federal law, to which the United States is a party as the sending state.

5. Whether a United States Court can be barred from reviewing habeas corpus petitions which raise Commerce Clause, Article I, § 8, Clause 3, violations of the exclusive jurisdiction of the United

States, in violation of friendship and other treaties as well as the Restatement of the Foreign Relations Act § 17 and § 18.

6. Whether Article III, § 2, Clause 3, and Title 18, U.S.C. § 3238 prohibit any state from jurisdiction or venue to hold trial for alleged crimes commenced in admiralty and maritime jurisdiction and not committed in any state, territory, or possession of the United States, since congress has determined where trial shall be held, and a tiny town in New Mexico is not mentioned as a place for said trials.

7. Whether a state waives a procedural bar when the state's highest court grants a motion to accept as if timely filed and then denies certiorari, after being fairly presented with an opportunity to rule on the issues, and when the state failed to allege the bar in its first response brief.

8. Whether a petition, for discretionary review, which allegedly arrives one day late, to a state's Supreme Court, can be a bar to federal habeas review, when the petition was placed in an envelope and returned to the sender without comment or even a record of the tendered filing, and when the petition was sent by guaranteed United States Mail, and the mail is not picked up after 11:00 A.M. each day.

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PRAYER

Petitioner, Robert Samuel Chappell, pro se, prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Tenth Circuit as herein presented.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals denying rehearing en banc is attached as Exhibit A.

The opinion of the Tenth Circuit Court of Appeals which affirms the decision of the United States District Court is attached as Exhibit B.

The opinion of the United States District Court is attached as Exhibit C.

The only state court reasoned opinion is the opinion of the New Mexico Court of Appeals and is attached as Exhibit D.

None of the above opinions are published.

JURISDICTION

The order and judgement for which certiorari is sought was filed in the United States Court of Appeals on December 22, 1994.

Petition for rehearing with suggestion for rehearing en banc was denied and entered on January 30, 1995.

This petition is timely filed on or before April 30, 1995.

Jurisdiction of this court is invoked under Article III and pursuant to Title 28 U.S.C. § 1254 (1).

CONSTITUTION, LAWS, AND TREATIES OF THE UNITED STATES

Article I, § 9, Clause 2. "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Article I, § 8, Clause 3, "To regulate Commerce with foreign nations, and among the several states, and with Indian Tribes;"

Article I, § 10, Clause 1. "No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal, coin Money; emit Bills of Credit;...; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, ..."

Article III, § 2, Clause 1. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties, or which shall be made, under their Authority; to all cases affecting ...; to all cases of admiralty and maritime jurisdiction ..."

Article III, § 2, Clause 3. "The trial of all crimes,..., shall be by jury, and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

Article VI, Clause 2. "This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding."

Amendment V, in part. "...; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ..."

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, ..., to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV. "No state shall make or enforce any law which shall abridge the privileges or immunities ..., nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Laws.

Title 18, U.S.C. § 3238. OFFENSES NOT COMMITTED IN ANY DISTRICT. "The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district,..., is arrested or first brought;..., an indictment or information may be filed in the district of the last known residence of the offender,..., or if no such residence is known the indictment or information may be filed in the District of Columbia."

Interstate Agreement on Detainers Act, 18 U.S.C. App. 585-591. Public Law 91-538 §§ 1-8 Dec. 9, 1970, 84 Statutes 1397-1403.

Article IV. "(c) In respect of any proceeding made possible by this article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, ... the court having jurisdiction

of the matter may grant any necessary or reasonable continuance."

Article V (c). "(c) ... is not brought to trial within the period provided in article III or IV hereof. the appropriate court of the jurisdiction where the indictment, information, or complaint had been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect."

NOTES: Emphasis added to "had been pending shall enter an order dismissing the same with prejudice."

STATEMENT OF THE CASE

On December 9, 1986, Petitioner was forced, at gunpoint, to board a plane to the United States, after being taken from his home, without warrant or other authority, by Bahamian counterparts to United States agents.

Petitioner was first brought to Miami, Florida. No information or indictment was outstanding in the place of last residence, in the United States, Los Angeles, California, and Title 18 U.S.C. § 3238 was applicable.

The employer company of Petitioner failed about one year after the kidnapping. The I.R.S. seized assets in the United States. Control could not be exercised over any factor of the company from the jail in Indianapolis, Indiana, where Petitioner was taken and forced through a trial for having failed to do a required act in Los Angeles, California.

Independent contractors with Petitioner's employer company brought criminal charges in New Mexico alleging securities law violations because of the conduct of an independent contractor who had allegedly had transactions in New Mexico.

Petitioner had not been in New Mexico nor in any state, territory, or possession during the times alleged in the indictment and had done no act which could be expected to directly, foreseeably, and intentionally result in crime in New Mexico. All

contacts were highly attenuated and by a third party, who Petitioner barely had met.

Letters were written by the Sheriff's wife which said that all the people in New Mexico wanted was money.

A detainer had been lodged at Sandstone F.C.I., under the Interstate Agreement on Detainers, on April 8, 1988, by Sheriff George Teague, of Lea County New Mexico.

On or about April 1, 1989, Petitioner was taken to Lea County by writ of habeas corpus ad testificandum and he was told that he was under court order to testify. Petitioner testified without a Miranda warning and was returned to Sandstone, Minnesota on or about April 10, 1989.

On August 18, 1989, the prosecutor made a request per Article IV of I.A.D., to which petitioner objected; however, the warden transferred petitioner to Lea County, New Mexico, without hearing, per U.C.E.A..

Petitioner was suffering from acute ocular histoplasmosis and needed treatment for his eye and requested speedy trial within the 120 days allowed per Article IV.

However, over 8 months had passed when parole was offered by the federal government. The parole was not to New Mexico. But Petitioner declined parole with the hope and promise of being returned to Sandstone F.C.I. for eye care which had been denied in New Mexico.

New Mexico ignored I.A.D.'s automatic speedy trial right and held Petitioner another month and with a farcical trial in a tiny town in Southern New Mexico, without witnesses in favor of Petitioner, and essentially without counsel except as a farce while the appointed attorney kept saying for $1,600,000.00 you can "walk away" from New Mexico. Conviction occurred along with a 30 year sentence, which appointed trial counsel threatened unless the money was paid. Petitioner had only a comb, a handkerchief, and a borrowed $50.00 bill when he entered the United States. He could not have paid the money, which he had never had and knew nothing.

Petitioner was returned to Sandstone F.C.I. and served the sentences to maximum release, before being turned over to a county jail to await extradition to New Mexico.

The governor of New Mexico, Bruce King, signed a false warrant which said that Petitioner had been present in New Mexico when the alleged crimes were committed, but Petitioner had been in no state, territory, or possession of the United States and had never been in New Mexico. Petitioner was transferred to New Mexico on the basis that a conviction had already occurred when in fact the hearing was to have been a pre-transfer hearing.

After arrival in New Mexico, the New Mexico Court of Appeals wrote a lengthy opinion which was

obviously wrong on all issues raised. A civil rights suit had been filed in Minnesota. It was obvious that the opinion was for the purpose of avoiding liability under the suit.

Petition for writ of certiorari was tendered for filing in the New Mexico Supreme Court, by counsel, and by United States Guaranteed Mail. The clerk returned the petition without comment and made no record of its tender for filing.

Petition was filed for habeas corpus in the United States District Court in New Mexico. The state admitted to exhaustion in that no remedy was available in New Mexico Courts. However, no mention was made of the procedural bar which was later alleged, along with a false affidavit from the Supreme Court of New Mexico that no petition for certiorari had been filed without mentioning the tendered petition which she had returned without comment.

Upon motion, the Supreme Court accepted the petition for cert., as if timely filed, and denied certiorari. The bar was removed.

The U.S. District Court, after much briefing, ordered that the petition be dismissed with prejudice because of procedural bar.

The dismissal of the petition was appealed to the United States Court of Appeals for the Tenth Circuit.

In the appeal process the Attorney General admitted that New Mexico had not been able to get

an admission of guilt and moved to change the warden's name on the petition from the previous warden to the current one as if the Tenth Circuit Court of Appeals should issue the writ based upon Interstate Agreement on Detainers and other violations.

The Tenth Circuit Court of Appeals then issued the opinion for which certiorari is sought.

NOTES: 1. Petition for certiorari was written while in Lea County New Mexico jail which had no typewriters nor law library. This court granted certiorari, with reversal and remand, by per curiam order. Petitioner believes that he could have overturned the conviction in Indiana for an alleged 27 cents "lull letter" except for the money extortion scheme in New Mexico. This would have allowed Petitioner to attempt to regain his citizenship and birthrights. 494 U.S. 1075 (1990).

2. The Attorney General of New Mexico did not oppose the Motion to Accept the Petition for Certiorari, as if Timely Filed, prior to the Supreme Court of New Mexico having granted the motion and having denied certiorari. There should have been a bar to the Attorney General then petitioning for the court to undo the fact that it had been fairly presented with and opportunity to review the issues. However, the Supreme Court of N.M. granted the Attorney General's Motion even though the rules say that by failing to brief the motion he waived the right to be heard further.

3. The eye was lost due to denial of medical care in New Mexico.

REASON FOR GRANTING CERTIORARI

I.

THE TENTH CIRCUIT COURT OF APPEALS AFFIRMED A DECISION OF THE UNITED STATES DISTRICT COURT OF NEW MEXICO WHICH WAS CONTRARY TO DECISIONS OF THIS COURT.

A. In finding a procedural bar to habeas corpus review, district court considered only two provisions of Coleman v. Thompson, 501 U.S. ____ (1991), i.e., 3a and 3b when 1a through 1k were clearly applicable. Id. ___; 115 L.ed. 644, 646.

Ylst v. Nunnemaker, 501 U.S. ____ (1993) was argued because the Supreme Court of New Mexico rarely to never issues writs of certiorari to review decisions of the New Mexico Court of Appeals. The courts of appeal are essentially one court. And the placing of the tendered petition for certiorari to the Supreme Court of New Mexico in an envelope and returning it to the sender without comment said nothing. Id. And further a petition submitted with a one sentence order from the Supreme Court which says certiorari denied, in essence, says nothing. This was the case with a subsequent petition for certiorari, essentially the same one which was returned as allegedly being one day late, which was submitted with a motion to accept as if timely filed. The motion had been granted and certiorari denied.

The opinions in essence said nothing. Ylst, supra. However the petition's acceptance as if timely filed, and certiorari then denied, showed that the procedural rule is not consistently applied and that the court had been fairly presented with an opportunity to rule upon the issues as presented a second time. Thus, the procedural rule was inadequate to bar habeas corpus review in federal court. There was no look through to the last reasoned opinion to determine federal issues or intertwining. Ylst, supra, and Harris v. Reed, 489 U.S. 255 (1989); also, Michigan v. Long, 463 U.S. 1032 (1983). There could be no independent or adequate state law basis for constitutional violations of the magnitude presented in the habeas petition. Sixth and Fourteenth Amendment violations were abundant as were Article I and Article III violations as states must follow the United States Constitution. Long, id. There was no "plain statement" stated clearly and expressly, based on "bona fide" separate, adequate, and independent state grounds. Coleman, supra 1a, 1k. ",(3) similarly, federal habeas corpus courts must ascertain for themselves if a petitioner is in custody pursuant to a state-court judgement that rests on independent and adequate state grounds. "Coleman, supra. Petitioner maintained that a court with no jurisdiction over the subject matter, i.e., crimes commenced or committed upon the high seas or in admiralty jurisdiction per Title 18 U.S.C. § 3238, no jurisdiction over the

person who had no ties whatsoever to New Mexico per Skiriotes v. Florida, 313 U.S. 69 (1941), and extraterritorial extension per International Shoe Company v. Washington, 326 U.S. 310 (1945) with Pennoyer v. Neff, 95 U.S. 714 (1878) et progeny, and no jurisdiction (as an underdeveloped legal system) in re territory, as described in Recaman v. Barrish, 408 F. Supp. 1189 (D.C.Pa), can have independent and adequate basis for, in essence, taking hostages and extorting or attempting to extort and for committing acts of war by extending even beyond the reach of the United States in violation of friendship and other treaties. Nor can a state develop an adequate or independent basis for abrogating the Sixth Amendment and Articles I and III.

B.

TENTH CIRCUIT COURT ACTUALLY FOUNDED ITS BAR UPON CAUSE FOR EXCUSING THE ALLEGED PROCEDURAL BAR.

Coleman v. Thompson, supra, recognizes that ineffective assistance of counsel can be the external factor which forms the basis for excusing a procedural bar as stated in Murray v. Carrier, 477 U.S. 478 (1986).

Ineffective assistance of counsel was properly raised in the direct appeal to the New Mexico Court of Appeals which based its denial of relief upon the

factors which constitute ineffective assistance of counsel, i.e., waivers, failures, and even secret off the record agreements between the judge and prosecutor or trial counsel. For the court of appeals to have even known of the secret agreements which were off the record and out of the courtroom a hearing would have been needed rather than ex parte communications. Murray, id.

Other circuits have found that when an attorney error causes a procedural default the first prong of the cause and prejudice standard is met. Strickland v. Washington, 466 U.S. 668 (1984). However, prejudice should be presumed from the surrounding circumstances per United States v. Cronic, 466 U.S. 648 (1984). A showing of cause due to errors of the first magnitude, by counsel, should justify reversal without a showing of more (prejudice).

In the instant case the procedural bar came from the attorney trusting United States Mail and the integrity of the New Mexico Supreme Court, this was apparently error to have done so. Arrangements could have been made to hand carry the petition for certiorari to the N.M. Supreme Court and to have gotten a receipt. Local counsel could have filed the petition.

Another factor, which must be considered, is that Petitioner was in prison and could not have filed the petition. Thus, the principles of Houston v. Lack, 487 U.S. 266 (1988) should apply in federal

courts and the state law basis should equitably be considered to be inadequate to justify a procedural bar. Same is not entirely independent since a one day lateness of a properly mailed item conflicts with federal law. Houston, id..

Ineffective assistance of counsel or counsel error must be attributed to the state. Coleman v. Thompson, supra, at 2257.

The Tenth Circuit Court of Appeals correctly found that the petition for certiorari was mailed by an attorney. But the court did wrong in attributing that error, bar, or default to Petitioner. Counsel's conduct in failing to comply with a procedural rule was in and of itself so egregious as to constitute ineffective assistance to meet the standard of Strickland, supra; Murray v. Carrier, supra; and Smith v. Murray, 477 U.S. 527 (1986) at 535; Kimmelman v. Morrison, 477 U.S. 365, 383-84 & n.8 (1986); United States v. Cronic, supra, n.20 (1984); Mayo v. Henderson, 13 F.3d 528, 533-36 (2nd Cir.1994); United States v. De La Fuente, 8 F.3d 1333, 1336-37 (9th Cir. 1993). The above cases cover the prejudice prong in the instant case also since more than colorable evidence of innocence was shown, of any crime at all from any part of the world, per United States v. Frady, 456 U.S. 152 (1982).

This petitioner received a per curiam order from this court on the issue of failure to raise ineffective assistance of counsel on direct appeal as a bar to

raising same on post conviction motions. The Solicitor General agreed with the position of Petitioner and the court found that ineffective assistance of counsel is best raised in post conviction motions rather than on direct appeal and further that a hearing is required when matters off the record and out of the courtroom are stated. Chappell v. United States, 494 U.S. 1075 (1990). The issue was handled in an awkward and circular, illogical manner as are the procedural bar concepts herein. Please see brief in 89-1040, Chappell v. United States, 494 U.S. 1075 (1990) as to the manner of handling Murray v. Carrier, supra, by the various circuits, and the illogic in same.

C. WHETHER "STRUCTURAL DEFECTS OR ERROR", AS DEFINED IN BRECHT v. ABRAHAMSON, 507 U.S. ____ (1993) CAN BE PROCEDURALLY BARRED, SHOULD BE DETERMINED.

Petitioner believes that each of the provisions in the Sixth Amendment to be of equal significance. Are witnesses in favor of a defendant not equally significant to a fair trial as trial by jury? Seventeen witnesses were requested on the record. The attorney stated "they would not come." The powers said "you may have a trial by jury but no compulsory process for witnesses in your favor." This also is a structural defect to a fair trial as is

ineffective assistance of counsel per Brecht, id. Trials in a place where a person has not been was one of the causes stated in the Declaration to a Candid World as the necessity for Declaring Independence from the Crown. Can there be an adequate basis for such conduct, by any county, of any state, to bring people from their homes in distant places, to force them to pay money or face a 30 year prison term. Are structural defects not as "plain error" or as subject matter jurisdiction: not subject to waiver or bar, and should same not be raisable at any stage of any proceeding? Do the above acts not defecate upon every concept and provision of the Constitution? Provisions of the constitution bared from federal enforcement is a bad concept.

D. THE PROCEDURAL BAR RULE IS NOT CONSISTENTLY APPLIED AND NOT IN PRINCIPLED WAY.

The Seventh Circuit found as follows:

State ground is "adequate" to justify denial of federal habeas review only if state acts in consistent and principled way. Treadway v. Farley, 35 F.3d 288 (7th Cir. 1994).

The Supreme Court of New Mexico makes exceptions to its own procedural rules. "Although the issues presented in Swafford's petition for post-

conviction relief appear to have been raised for the first time in this collateral proceeding, we nevertheless granted certiorari to consider the questions implicated by the allegedly unconstitutional sentences. We are reluctant to issue certiorari on issues that could have been, but were not raised on direct appeal, even where the issues raise important constitutional rights. State v. Gillihan, 86 N.M. 439, 524 P.2d 1335 (1975). However, sentences the court is without legislative authorization to impose well may implicate the power of the court to have so acted. It is for this fundamental reason, coupled with the important constitutional questions raised, that we granted certiorari in this case." Swafford v. State of New Mexico, 112 N.M. 3, 810 P.2d 1223 (N.M. 1991).

Other exceptions to procedural rules are the following.

Unexplained delay after mailing. Where counsel was diligent and acted within ample time to accomplish timely allowance of appeal under former appellate procedure, and order was mailed in more than enough time to have reached the Clerk of the Supreme Court, unexplained fact that it was filed one day late would not overcome presumption of receipt in due course of mail. Adams v. Tash, 678 N.M. 446, 362 P.2d 984, (1961).

Presumption in due course is a federal law concept.

Untimely notice waived where counsel ineffective, State v. Peppers, 110 N.M. 393, 796 P.2d 614 (1990).

Under New Mexico law only the clerk can file a petition; documents are tendered to the clerk for filing. The clerk's duty is to make a record of all documents filed and tendered for filing. NMSA 12-310.

Per NMSA 12-308, Computation of time, any day in which the office of the clerk is closed for more than three hours between 8 & 5, considered to be a holiday; thus every day a holiday because mail is not picked up after 11 A.M., per post master, by N.M. S.Ct. Filing by mail is permitted by law. NMSA 12-307 says "Filing by mail is permitted." Also a 3 day allowance is a part of the appellate rules; however, every critical stage is exempted from the rule which, while there, applies to nothing.

The above appear to be somewhat less than principled. Treadway, supra.

12-307 A. states as follows: "Filing by mail is not complete until actual receipt. This is less than principled in light of all of the above. Treadway, id.

There is doubt in re legislature's intent about time periods; limitations upon jurisdiction (or jurisdictional), Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991). The court as

above revealed shifts back and forth. One day the time periods are jurisdictional and the next they are not.

"Failure to comply with appellate rules does not prevent review of fundamental error." State v. Reynolds, 79 N.M. 195, 441 P.2d 235 (Ct. of Appeals N.M. 1968). And State v. Jett, 111 N.M. 309, 805 P2.d 78 (1991). Petitioner maintains that New Mexico's Rules of Appellate Procedure, Judicial Pamphlet 12, 1992 Replacement, are less than adequate for an independent and adequate state law ground for procedural default.

The Tenth Circuit Court of Appeals recognized the inconsistent application of procedural bar rules in Gutierrez v. Moriarty, 922 F.2d 1464 (10th Cir. 1991). Se headnote 7, id., which is directly on point in the instant case.

"Because New Mexico Courts do not strictly or regularly follow procedural bar rule when dealing with defaulted claims of pre-indictment or pretrial delay, the procedural rule is not an adequate basis for state court denial of the claim and will not preclude federal habeas corpus review of the claim." Gutierrez v. Moriarty, id.

Violations of the speedy trial rights per the Interstate Agreement on Detainer, as herein, makes Gutierrez, id., directly on point. The I.A.D. issues should not have been procedurally barred. I.A.D. is federal law, also, as an issue to preclude barrment. Mauro, supra, Cuyler, supra.

Pursuant to the Supreme Court of New Mexico's statement only that court could impose or waive a procedural rule. Swafford, supra, 2nd preceding page hereof. In Swafford, the petitioner filed a petition for habeas corpus for issues not raised on appeal. By waiving the procedural rule, habeas corpus petitions and appeals are implicated as in the instant case. The issues presented on appeal to the Court of Appeals of New Mexico were ruled upon by the court of appeals in a lengthy opinion. The Supreme court did not find a procedural bar by clearly stating anything at all. The return of the petition without comment does not overcome the presumption contained in 1a of Coleman v. Thompson, nor in Harris v. Reed, nor in Ylst v. Nunnemaker, supra.

A petition was submitted to the Supreme Court of New Mexico along with a motion to accept the petition for certiorari as if timely filed. The Supreme Court of New Mexico granted the motion to accept as if timely filed and then denied certiorari. This was conclusive proof that the court had not relied upon an independent state law ground for denying the petition. Further proved was the fact that the New Mexico Supreme Court had in fact been fairly presented with an opportunity to rule upon the issues raised. The issues were exactly the same as presented in the petition for habeas corpus in federal court. No procedural bar existed per Coleman v. Thompson, supra.

E. JURISDICTIONAL ISSUES COULD NOT BE BARRED AND SHOULD HAVE BEEN RULED UPON BY THE FEDERAL COURTS. THE DECISION OF THE TENTH CIRCUIT AND OF THE DISTRICT COURT OF NEW MEXICO CONFLICTS WITH THIS COURT'S DECISIONS AND THOSE OF ALL OTHER CIRCUITS AND SISTER STATES.

1. Had Petitioner and his employer company, Nassau Life Insurance Company, Limited, been residents of the United States, Rush v. Savchuk, 444 U.S. 320 (1980) would have been directly on point. However, Petitioner had not been in any state, territory, or possession of the United States. All acts done were under the authority of other nations and all acts were legal in those other nations. There were no minimum contacts with New Mexico. No office, no address, no ties of any kind to the state of New Mexico.

The evidence against Petitioner was a book, copyrighted in Washington, D.C., which had no false statements and was offered for sale in book stores in many states and in many countries, and Petitioner's name on contracts executed by the client or his agent in the Turks and Caicos Islands, B.W.I., a British Crown Colony. Nassau Life Insurance Company, Limited, issued no policies, annuities, nor investments of any kind to United States citizens or residents. Nassau Life sold trust arrangements which were legal in the United States

and in Commonwealth Countries and in most countries of the world. Nassau Life also acted as trustee for those common law trusts. Clients were brought to Nassau Life by former I.R.S. agents, C.P.A.'s and Financial or Estate Planners. All were independent contractors. Nassau Life had only one agency, and that agency was in the Turks and Caicos Islands.

Clients ranged from prominent businessmen to entertainers, professional people, Central Intelligence Agents, Army personnel, and law enforcement officers. All aspects of the activities were highly scrutinized and were legal in every respect. Two clients were judges in the United States. The objective was to legally reduce income tax, avoid death and inheritance taxes as well as capital gains tax, and probate. The friendship treaties were used in many types of transactions, as were special treaties as to real property transactions. Nassau Life's activities were found to be legal in the United States District Court in Dover, Delaware, a sophisticated jurisdiction, and by a federal grand jury in Los Angeles, California.

Petitioner was never approached to do anything illegal for or by anyone except government agents and all were declined.

Even if Nassau Life Insurance Company had been a United States resident, New Mexico would not have had jurisdiction over its activities, officers, or employees per Rush, id.

2. To Exercise Subject Matter Jurisdiction Over The Person Requires Ties To The Place.

Skiriotes v. Florida, 313 U.S. 69 (1941), denies jurisdiction to New Mexico for the exercise of its subject matter jurisdiction over this petitioner. Skiriotes was a sponge gatherer who operated out of Florida. Florida passed a law which said that sponges could not be taken in a certain manner. Skiriotes went beyond the territorial waters of Florida and used the method forbidden by Florida Law. This court held that since Skiriotes was a resident or citizen of Florida, that the state could exercise its laws against its own citizens in any part of the world. However, had Skiriotes been from another place, Florida could not exercise its jurisdiction against that person. The case is directly on point, in the instant, since Petitioner had no ties of any kind to New Mexico; he could not be presumed to know the laws of New Mexico since there was no application of those laws to any activities in which Petitioner was involved. Petitioner was in the business of creating offshore business trust organizations and acting as trustee for those separate distinct legal or judicial entities whose situs was the Turks and Caicos Islands. The officers of those business trust organizations were the clients who made the day to day business decisions. New Mexico could pass laws applying to its own citizens owning such offshore companies, maybe? But,

those laws could not apply to non-citizens or non-residents of New Mexico.

For New Mexico to enforce its laws in the Turks and Caicos Isls., would violate international laws and treaties as well as Article I, §§ 8, and 10. NEW MEXICO CANNOT PROCEDURALLY BAR SUCH CONDUCT BY AN INCONSISTENTLY APPLIED PROCEDURAL RULE. Same would also elevate New Mexico's procedural rules to a position superior to the Constitution and laws of the United States and also of treaties with foreign nations. No person in the world would be safe from extortion, under the color of state law, if such conduct is permitted by any state of the world.

Attention should be called to the fact that because of practices in New Mexico the anti-peonage laws were passed in the United States Congress: Title 42 U.S.C. § 1994 and Title 18 U.S.C. § 1581. See Slaughter House Cases, 83 U.S. 36 (1873). And further New Mexico still uses its criminal statutes to collect money extra-territorially. State ex rel Robert James Walker v. Ramsey County District Court, 368 N.W. 2d 28. Such practice deserve the attention of this court. Certiorari should be granted. As recently as 1993, a New Mexico County was using its criminal codes to regulate the price of lipstick in Los Angeles, California. Such conduct cannot be permitted.

3. The Restatement of the Foreign Relations Act, §§ 17 & 18.

Subject matter jurisdiction cannot extend to acts in foreign commerce. A state with an underdeveloped legal system cannot extend beyond activities centered within its borders. See Recaman v. Barrish, 408 F.Supp. 1189 (1975) for an excellent discussion on Jurisdiction to prescribe a rule of law. New Mexico has, perhaps, the most underdeveloped legal system in the nation. In the instant case no sophisticated sister state extended after investigations. Federal courts had made favorable rulings to Petitioner's employer company's activities. In the instant case losses were caused to people in many places and a heavy burden was place upon international commerce; but for New Mexico's violation of the Commerce Clause no person could have lost even one cent. Assets could have been recovered and saved had New Mexico not placed that heavy burden by causing the imprisonment of its own citizen's agent (their agent by contract) and not the agent of Nassau Life Insurance Company, Limited nor of Petitioner. Petitioner had had no business activities of any kind in the United States for several years and he had no agents for any purpose whatsoever. These issues were presented to the New Mexico court of Appeals and received an opinion totally inadequate for any purpose. A procedural bar under the present set of facts is farcical on its face. Under the objective territorial

principles of jurisdiction, or of the subjective principles, New Mexico had no jurisdiction over the subject matter under either principle. Recaman, id; Tamari v. Bache & Co. (Lebanon) S.A.L., 730 F.2d 1103 (1984).

In any event, the issues presented herein and in the United States District Court of New Mexico, and to the Tenth Circuit Court of Appeals, are strictly QUESTIONS OF FEDERAL LAW, which those courts cannot duck with the procedural bar farce. Please see Grunenthal GmbH v. Hotz, 712 F.2d 421 (1983). Please notice that the federal government did not find or allege a scheme to defraud. The statements were to the opposite effect that activities of Nassau Life were legal. No scheme was proven in New Mexico. The trial was not under the Securities Acts of 1933 or 1934; the trial was under New Mexico Securities Laws which are inadequate for enforcement in such circumstances as herein. Id. note 5. Such conduct by New Mexico is an act of war.

4. ARTICLE III, § 2, Clauses 1 and 3, AND TITLE 18 U.S.C. § 3238 PROHIBIT JURISDICTION TO NEW MEXICO OVER PETITIONER.

No one could deny that the alleged crimes were commenced in the Turks and Caicos Islands, B.W.I.; thus, the maritime and admiralty jurisdiction of the United States, which extends to all cases. To

procedurally bar its own exclusive jurisdiction is a flagrant affront to the Constitution.

The place for trial of all crimes is stated in Article III, § 3, Clause 3. Also stated is the provision for congress to determine the place for trial of crimes not committed in any state. Title 18 U.S.C. .§ 3238 fixes that place, in compliance with Clause 3, as follows: "The trial of all offenses begun or committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, shall be in the district,..., is arrested or first brought;..., an indictment may be filed in the district of the last known residence of the offender, ..., or if no such residence is known the indictment or information may be filed in the District of Columbia" Id. No one could deny that all of the alleged offenses herein were commenced elsewhere and out of the jurisdiction of New Mexico, nor that Petitioner had never been in New Mexico (except to refuel an airplane in Santa Fe airport in 1965) and that trial for any crime could not be in New Mexico Courts. Id.

5. NEW MEXICO EXCLUDED LIABILITY FOR PETITIONER PERSONALLY FOR ACTS DONE IN THE SCOPE OF HIS AUTHORITY AS AN OFFICER OF NASSAU LIFE INSURANCE COMPANY LIMITED.

It would have been necessary for New Mexico to prove that Petitioner's employer did wrong acts in order to convict Petitioner of a crime. Individual transactions would have been required. Barnes v. Saddler Associates, 95 N.M. 334 (N.M. S.Ct. 1891). Not one act was done for Petitioner's account and risk in the United States. Petitioner did not receive even one dollar from any person in New Mexico.

No issue is procedurally barred!

IN THE SUPREME COURT OF NEW MEXICO

November 4, 1993

STATE OF NEW MEXICO, vs. ROBERT CHAPPELL

NO. 8000-01914

ORDER

"...motion to accept the petition for writ of certiorari as timely filed,..."

NOW, THEREFORE, IT IS ORDERED that the motion hereby is GRANTED.

ORDER

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari hereby is DENIED.

Please see exhibits "E" and "F".

ATTEST: A TRUE COPY.

Kathleen Jo Gibson

Clerk of the Supreme Court
of the State of New Mexico

6. ARTICLE 5 (c) OF THE INTERSTATE AGREEMENT ON DETAINERS MAKES VIOLATION OF ARTICLES 3 AND 4 JURISDICTIONAL QUESTIONS.

5. C. "..., is not brought to trial within the period provided in Article 3, or Article 4 of this agreement, the appropriate court of the jurisdiction where the indictment, information, or complaint had been pending shall enter an order dismissing it with prejudice, and any detainer based thereon shall cease to be of any force or effect."

Please notice the words: "had been pending." After the 120 days for trial to commence, per Article IV, had passed, the indictment was no longer pending. Please notice, also, the term "shall." Per federal law it is mandatory that the indictment be dismissed with prejudice. Cuyler v. Adams, supra, and Mauro, supra. How much clearer could the Congress of the United States have spoken?

The only jurisdiction remaining to the State of New Mexico was to dismiss the indictment with prejudice and to return the prisoner to the sending state, i.e., the United States. Petitioner was forced to trial on an indictment which no longer was valid by federal law and by which the state had agreed to be bound.

Petitioner maintains that federal law violations as above cannot be barred by an inadequate state procedural rule. Abie State Bank v. Bryan, 282

U.S. 765 (1931). Revalidated in Michigan v. Long, 463 U.S. 1032 (1983).

REASON FOR GRANTING CERTIORARI
II.

THE TENTH CIRCUIT COURT OF APPEALS AFFIRMED A DECISION WHICH CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

A. Petitioner was ordered to show cause and prejudice for a non-existent procedural bar, when actual innocence had been alleged, federal questions were raised, and jurisdictional issues were apparent. The procedural bar was allegedly for having failed to petition the state's Supreme Court for certiorari after the state's court of appeals had issued an opinion. Certiorari had been sought; but, the clerk of the Supreme Court placed the petition in an envelope and returned it to the attorney who had sent the petition by guaranteed United States Mail. The clerk then filed a false affidavit which said that no petition had been filed in the Supreme Court for certiorari. The clerk had even failed in her duty, by law, to make a record of all petitions filed and tendered for filing. The state had failed to raise the procedural bar in its first response to the habeas corpus petition, but, instead, admitted that no remedy was available in New Mexico courts.

Petitioner then filed a second petition for certiorari in the New Mexico Supreme Court, along with a motion to treat the petition as if timely filed. The motion to accept as if timely filed was granted, and certiorari was denied. The Attorney General who had not opposed the motion to accept as if timely filed, and by Rule was barred from being heard further, moved the state's Supreme Court to undo the fact that it had been presented fairly with an opportunity to rule on the issues but had declined by denying certiorari. The magistrate still insisted that cause and prejudice must be shown and found that since an attorney had mailed the first petition for certiorari that cause had not been shown. Other courts and circuits have found otherwise. The Tenth Circuit affirmed.

1. "State ground is 'adequate' to justify denial of federal habeas review only if state acts in consistent and principled way." 28 U.S.C. § 2254 (a), Treadway v. Farley, 35 F.3rd 288 (CA 7 Ind. 1994).

Petitioner has shown that the state did not act in a consistent way. Gutierrez v. Moriarty, 922 F.2d 1464 (10th Cir. 1991).

In Swafford v. State of New Mexico, supra, the Supreme Court excused failure to appeal to any court and ruled on a petition for habeas corpus. This was a 1991 case.

At times the court recognizes the federal concept of "receipt in due course of mail." State v. Peppers, supra, (1990), and the Supreme Court of New Mexico found that ineffective assistance of counsel excuses lateness. Id. The United States District Court used ineffectiveness assistance as the reason for the bar rather than a basis to excuse the bar.

Adams v. Tash, supra, excuses a procedural bar when counsel was efficient.

As to New Mexico's way being principled the facts are stated above, the return of the petition without comment, accepting a second filing and then denying certiorari only to attempt to undo the fact a few weeks later. The other facts of the case were not principled in any way: the ruling on I.A.D., the trial without witnesses in petitioner's favor; trial without subject matter jurisdiction; using deceitfully obtained testimony without a Miranda warning and assistance of counsel; extortion attempts; and a conviction of a totally innocent person who had no ties to the state.

New Mexico did not act in a principled way. Treadway, supra.

2. "Failure to seek discretionary review by state Supreme Court did not result in failure to exhaust state remedies or in procedural default." Dolny v. Erickson, 32 F.3d 381 (C.A.8, Minn. 1994).

3. "Petitioner was not required to seek review in Georgia's Supreme Court of the Georgia Court of Appeals affirmance of his convictions as precondition to habeas review..." Buck v. Green, 741 F.2d 1567 (C.A.11, Ga. 1984).

State admitted to exhaustion in its first response and the bar was alleged later as being a way to prevent habeas review, when the Supreme Court of New Mexico rarely to never reviews a decision of its court of appeals.

4. Petitioner maintains that much plain error existed in the trial and "structural defects" per Brecht, supra, and thus, the split decision Tenth Circuit case Esquibel v. Rice, 13 F.3d 1430 (10th Cir. 1994) is on point as to the dissenting opinion and as to the legality of the detention being the question rather than whether the court of appeals ruled properly on the issues before it. In the instant, Petitioner is held in a state without subject matter or other jurisdiction. Plain error, which cannot be barred.

5. "Claims presented in habeas corpus petition will not be procedurally barred so long as state appellate court has given at least cursory consideration to them. Hadley v. Caspari, 36 F.3d 51 (C.A.8, Mo. 1994).

The New Mexico Court of Appeals wrote a lengthy, non-published, opinion. The Attorney General admitted, in a sense that the whole

purpose of the proceedings were to force a guilty plea to something.

6. "Fundamental miscarriage of justice exception excusing a procedural default requires showing of actual innocence..., nor may it be disregarded in a case of procedurally defaulted constitutional claims that otherwise would require no showing of prejudice." Whitmore v. Avery, 26 F.3d 1426 (C.A. 8, Neb. 1994).

Petitioner argued his actual innocence. The only proof of guilt were uncrossexamined statements made to a grand jury which were used as substantive evidence of guilt without a limiting instruction. The Tenth Circuit Court of Appeals ignored that argument. Id.

B. "Challenge to subject matter jurisdiction could be raised for first time on appeal, in habeas corpus proceeding, because it could not be waived." 28 U.S.C.A. § 2254. Garlotte v. Fordice, 29 F.3d 216 (C.A.5, Miss. 1994).

Petitioner maintains that fundamental or plain error per Rule 52 of Rules of Criminal Procedure cannot be barred even in habeas corpus petitions. Courts of appeals may raise plain error, sua sponte, and rule on the error. United States v. Gray, 468 F.2d 257 (C.A.3, Pa. 1972). To do otherwise would subordinate the United State's Constitution to a state's procedural rules and even violate the oath of office taken by every federal judge; i.e., to uphold the Constitution and laws of the United States.

Jurisdiction over the subject matter was raised and procedure barred, in the 10th Circuit, in direct conflict with Garlotte, supra.

C. In a civil suit, in Minnesota, the United States District Court, for the District of Minnesota, found essentially that New Mexico did not have jurisdiction due to minimum contacts per International Shoe Company v. Washington, 326 U.S. 310 (1945) and progeny. The only jurisdiction for the court, in Lea County New Mexico, was over the Securities Laws of New Mexico. However, those laws could not be applied to Petitioner because the alleged contacts were all highly attenuated and by a third party. A part of the test is the difficulty of the defendant in presenting a defense. That was impossible for defendant, with an attorney who wanted $1,600,000.00 to allow Petitioner to "walk away" from New Mexico and who did no preparation at all for trial and presented essentially no defense, with the only witness being Petitioner's daughter who had been to the Turks and Caicos Islands, the Bahamas, and to Guyana, when proof of actual innocence was in the documents themselves, which had been denied to Petitioner. Petitioner was held in a county jail with no typewriter, law library, or medical care. The state was so determined to force petitioner to pay money, he did not have, nor had he ever had, that Petitioner was denied critical eye care and caused to lose the vision in his left eye due to ocular

histoplasmosis. To force a guilty plea and to extort money was the aim. This information was presented to the U.S. District Court but ignored. Petitioner believes that crimes under the Civil Rights Laws were committed against Petitioner. To cover-up those atrocities has appeared to be the aim in New Mexico, by a forced guilty plea, to terminate the effects of the farcical trial in the tiny town in Southern New Mexico, and thereby to waive all liability for the crimes.

There is diversity among the Circuits as to what constitutes subject matter jurisdiction. New Mexico has not yet defined its jurisdiction to comply with the constitution. The position of one New Mexico judge sums up the general thinking, Harvey Forte, in Eddy County, New Mexico, who believed that his jurisdiction extended around the world, and who sentenced people to life sentences for contempt of court. Subject matter jurisdiction has not been considered in the state because of its primitivity or underdevelopment. The position is, as in the instant case, if the defendant is before the court we can try him. I.A.D. does not expand the jurisdiction the court did not have. Under any civilized principle of law the state of New Mexico could not exercise its jurisdiction over this Petitioner. New Mexico had no jurisdiction. Per preceding and infra.

D. There is diversity among the circuits on the Interstate Agreement on Detainers. Most circuits find that the agreement must be liberally construed

in favor of the Petitioner per Article 9 of I.A.D.A., and also, that time deadlines must be followed to the letter of clearly worded provisions of the federal law. United States v. Willis, 958 F.2d 60 (5th Cir. 1992); Snyder v. Sumner, 960 F.2d 1488 (9th Cir. 1992); United States v. Pringle, 751 F.2d 419 (C.A. 1, 1984); United States v. Kucik, 909 F.2d 206 (C.A. 7, 1990); United States v. Berberian, 851 F.2d 236 (C.A.9, 1988); United States v. Rey, 768 F.2d 991 (C.A. 8, 1985). The above cases find the 120 day time for trial to commence to be NOT waiveable.

The United States District Court for the District of New Mexico found that same can be waived and that state courts can rule any way they want on that federal question in direct conflict with Abie State Bank, supra, and Long, supra. The Tenth Circuit affirmed. State v. Chira, 191 A.2d 308 (N.J.) found that the Interstate Agreement on Detainer is federal law about which state courts have nothing to say. The Tenth Circuit seems to be grossly out of step.

REASON FOR GRANTING CERTIORARI
III

THE NEW MEXICO COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

A. The New Mexico Court of Appeals says that Article 4 of I.A.D.A. is not violated, requiring dismissal of the charges when the 120 days, for trial to commence, have passed when transfer was via Article 4, and Article 5 (c) requires dismissal.

A detainer was lodged against Petitioner, while a federal prisoner at Sandstone, F.C.I., on or about April 8, 1988, by Sheriff George Teague, of Lea County, New Mexico.

On April 1, 1989, Petitioner was transferred by writ of habeas corpus ad testificandum, to Lea County, New Mexico, where he was held for about 10 days and returned to Sandstone, F.C.I., on August 18, 1989, a request was made for temporary custody, per Article 4, by the Fifth Judicial District Attorney. Over protest petitioner was transferred, on November 27, 1989.

Counsel was not provided until about 70 days after arrival in the receiving state. Petitioner filed a request to represent himself when it became obvious that the attorney was doing nothing toward preparing a defense on complicated issues of law and fact. Discovery was not even furnished to petitioner as promised.

The 120 days passed in total disregard for the time deadline. There was no extension in open court, and good cause for the delay was not shown.

Nine months and seven days had passed when trial commenced. New Mexico had agreed to allow

Petitioner to be paroled to another place. Same is not known but it was to either Texas or to Indiana.

Parole had been declined because of ocular histoplasmosis in the left eye and the only hope for saving the sight was to be returned to Sandstone, F.C.I. for the medical treatment which New Mexico denied. Petitioner was psychologically and physically disabled.

The federal parole officer stated that Petitioner would do every day of the federal sentence if parole was not accepted.

Trial was then held on September 5, 1990, long after the time for trial to commence, and long after jurisdiction, if any, was lost.

The New Mexico Court of Appeals found that the time for trial to commence had been waived by the appointed counsel.

The opinion of the N.M. Court of Appeals conflicts with this court's opinion in Cuyler v. Adams, 449 U.S. 433 (1981); United States v. Mauro, 436 U.S. 340 (1978). The position of the Circuit Courts is as follows. Time limits cannot be waived for trial to commence. An automatic speedy trial right is created by I.A.D.A.: United States v. Willis, 958 F.2d 60 (5th Cir. 1992); United States v. Kingston, 875 F.2d 1091 (C.A.5, 1989); Snyder v. Sumner, 960 F.2d 1488 (9th Cir., 1992); United States v. Pringle, 751 F.2d 419 (C.A.1, 1984); United States v. Kucik, 909 F.2d 206 (C.A.7, 1990);

United States v. Berberian, 851 F.2d 236 (C.A.9, 1988); United States v. Rey, 768 F.2d 991 (C.A.8, 1985).

Please see Glasser v. United States, 315 U.S. 60, 70, 71, on waiver of rights, as enhanced by Miranda v. Burbine, 475 U.S. 412 (1986). And Brewer v. Williams, 430 U.S. 387 (1977) also deals with waiver. Petitioner believes that the clear language of I.A.D.A. makes the time limits mandatory. Good cause cannot be determined by the prosecutor nor defense counsel. Good cause for delay must be shown in open court. No courtroom is not good cause. A crowded calendar or time to prepare are not good cause. Waiver is not possible. United States v. Willis, supra.

The New Mexico court of Appeals ruled counter to this court on the following cases: Miranda v. Arizona, 384 U.S. 436 (1966) as to questions after indictment, without counsel or warning; Glasser v. United States, 315 U.S. 60 (1942) as to waiver of constitutional rights; Brewer v. Williams, 430 U.S. 387 (1977) as to waiver and strong presumption against waiver; Maine v. Moulton, 474 U.S. 159 (1985) as to chicanerously obtained waivers as herein when Petitioner was told that he was under court order to testify by writ of testificandum; Glasser, supra, as to fundamental error; Miranda v. Burbine, supra, as to waiver of right not knowingly and intelligently but instead by chicane; United States v. Antoine, 906 F.2d 1379 (C.A.9, 1990) and

United States v. Selea, 550 F2.d 1303 (C.A.5, 1977) as to failure to provide trial record requiring reversal; Hughes v. Oklahoma, 441 U.S. 322 (1979) as to commerce clause; Lewis v. B.T. Investment Managers, Inc., 447 U.S. 27 (1980) as to commerce clause violations; Arkansas Electric Cooperative Corporation v. Arkansas Public Com., 461 U.S. 375 and Main v. Taylor, 477 U.S. 131 (1986) as to commerce clause violaticns; United States v. Amrep. Corp., 560 F.2d 539, cert. den'd, 434 U.S. 1015 (C.A.2, NY, 1977); Skiriotes v. Florida, 313 U.S. 69 (1941) as to jurisdiction over the person; International Shoe Company, supra, and Rush v. Savchuk, supra, as to jurisdiction.

The bringing of Petitioner to New Mexico is so unique, for money extortion purposes, after knowing that Petitioner was kidnaped from his home in another country, when no other jurisdiction had even considered such action, that the entire constitution and this court's decisions were violated. It's like nothing else. Roy Bean's deputies were on a long search for victims to bring before Roy's court for a 'fair' trial, a fine, of their boots saddle and horse and then a swift hanging (immediately).

THE TRIAL AND IMPRISONMENT WAS A COMPLETE FARCE AND MOCKERY OF JUSTICE.

REASON FOR GRANTING CERTIORARI

IV.

EVEN HANDEDNESS, FAIR PROCEDURE, AND SUBSTANTIAL JUSTICE

Petition for certiorari was filed in this court under the number 89-1040, Chappell v. United States, 494 U.S. 1075 (1990). Certiorari was granted with reversal and remand, per curiam.

In that petition, the reasons for gross injustices to this petitioner were spelled out. Successful companies had been built by the age of 30. Petitioner was asked to be a candidate for state senate, in Indiana, in order to assist in getting the state's delegate votes for Barry Goldwater, rather then have them go to Nelson Rockefeller.

On Petitioner's board of directors were former United States Senator William E. Jenner, Robert Wyatt, N.E.A. President, and lawyers who were specialist in their fields. One was a member of the Order of the Coiff, having graduated number two in his major university law class.

For reasons unknown petitioner was ordered to pay $250,000.00 to Senator Vance Hartke's Campaign Manager or else to have problems with both the I.R.S. and the S.E.C.. Petitioner, having done nothing wrong refused to pay and made a trip with Jenner to Washington, D.C.. A meeting was held with Former United States Senator James O. Eastland, Chairman of the Senate Judiciary

Committee. Contacts were made to prominent Democrats. But, when the threats were beginning to be carried out, and a call came from a prominent Democrat Party Official, with the comment "go get them," Petitioner called Eastland and was advised to go to the newspapers. The stories were front page in Indiana for several days.

Two trials and a ten year tax audit resulted in an acquittal on all charges and a minor tax adjustment. However, the companies were destroyed in the nine years of fighting.

After the affairs of the companies were properly, legally, morally, and ethically wound-up, a new business was commenced. Jimmy Carter was then elected. The same people as before controlled the Indiana Securities Commission and other offices. Petitioner's new company was doing well; but, there was no way that it would be allowed to grow and prosper in Indiana. It, too, was forced out of business. Petitioner left the country on August 5, 1977. But, two years later an indictment was brought in Indiana for the most foolish charges. Petitioner was caused to be convicted of two counts of mail fraud on the charge that two checks were 27 cents each too much in order to lull two millionaire familes into a false sense of security. The mailing was long after all money or property was received. United States v. Maze, 414 U.S. 395 (1974) had already said that same did not constitute

mail fraud, since all that could be acquired was time and not money or property.

Petitioner was not arrested on the charge until November of 1980, in Los Angeles, California. Trial was held in November of 1981, and the appeal was decided in February of 1983. Petitioner's new company was doing well in the Bahamas and other countries. And, the I.R.S. raided Petitioner's Whittier, California information office when the appeal was final. This was a foreign company which was 100% legal in every respect. However, 32 armed agents did the raid on the office. A grand jury investigation ended with a NO-BILL, and a comment "I am intrigued with this concept and I would like to learn more about it." This was a federal grand jury. Fearing the destruction of another fine company, Petitioner left the United States, with the intention "never to return."

Petitioner had never been a criminal nor will he ever be one. The foreign company continued to grow and to prosper. A series of seminars, weekly, brought people by the hundreds to the Island of Freedom, Eleuthera, Bahamas for the seminars and offshore services, of Petitioner's company. Works by Nobel Laureate Milton Friedman, and of Ferdinand Braudel, Nobel Laureate, Historian, were emphasized along with special taped presentations prepared by Dr. Richard Armey, Economics professor, and now a United States Congressman.

As a result of hearing a presentation in one Freedom Seminar, the Consul of Guyana to the Bahamas persuaded Petitioner to make a full state visit to Guyana.

Guyana signed an agreement to change its economy from communism to capitalism and private free enterprise on July 4, 1985. This was the beginning of the unraveling of communism as advise was given to other communist countries. Please remember that Petitioner had been driven from the United States and never expected to return. Guyana promised citizenship which was to become effective on September 15, 1986.

Petitioner was writing a book: "Secrets of Offshore Tax Havens." The book outlined the exact economy which is being implemented worldwide and in the United States today. One could conclude that the Contract with America came from that book. The possible end to communism was recognized in the Preface.

Petitioner was taken by force from his home, without warrant, or other authority, and forced to board a Bahamasair flight to Miami, Florida. Petitioner begged for one day to change names on accounts and to protect assets. That plea was denied.

After 10 days in Miami jails, Petitioner was taken illegally to Indianapolis, Indiana, where he was forced through a humiliating trial for having

failed to do a required act in Los Angeles, California.

Petitioner answered questions freely from all of the government agents who questioned him. Petitioner was at all times kind and respectful to his captors. However, all due process rights have been denied, by every official who has participated in any aspect of petitioner's presence in the United States.

It is felt that great punishment has resulted form petitioning this court for certiorari.

New Mexico alleged that securities laws in New Mexico were violated while Petitioner was doing all of the above, and that Petitioner was scheming with a person, whom he had met for 10 minutes, on one occasion, to defraud people in New Mexico.

Please imagine a situation where the world's most sophisticated estate planning system, found to be legal by the United States District Court in Dover Delaware, and with favorable federal decisions in other courts, being placed on trial, in a tiny town in Southern, New Mexico, where Petitioner has never been, without compulsory process, and with counsel whose only interest was to cause a payment of $1,600,000.00, or, in the alternative, for petitioner to face a lengthy prison term in New Mexico.

The only evidence against Petitioner was his book, an uncrossexamined statement to a grand jury, which was used as substantive evidence of guilt, and the forced guilty plea by the alleged codefendant. All manner of lies were then told by

the prosecutor in that case in order to extradite Petitioner to New Mexico and the lying has not stopped.

A heavy burden was placed on international and interstate commerce, with great losses to many people, by New Mexico's underdeveloped legal system being extended beyond its borders.

Even handedness, fair procedure, and substantial justice require Petitioner's release.

CONCLUSION

Petitioner's immediate release should be ordered by this court, after certiorari is granted and the truth of Petitioner's allegations is determined. That which has happened to Petitioner should not be tolerated in any part of the United States. Petitioner believes that he has been subjected to civil rights crimes under the color of state law. Petitioner prays for any and all relief which is just and proper.

Respectfully submitted
Robert S. Chappell

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT SAMUEL CHAPPELL,)
Petitioner - Appellant,)
v.) No.94-2008
LAWRENCE BARRERAS, successor)
to John Thomas as Warden of New)
Mexico State Penitentiary,)
Respondent - Appellee)

ORDER
Entered January 30, 1995

Before McWILLIAMS, BARRETT, and LOGAN, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active

service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

By
Deputy Clerk

EXHIBIT "B"

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
DEC 22 1994
PATRICK FISHER
Clerk

ROBERT SAMUEL CHAPPELL,
Petitioner - Appellant,
v.
No. 94-2008
LAWRENCE BARRERAS, successor to John Tomas as Warden of New Mexico State Penitentiary,
Respondent - Appellee.

(D.C. No CIV-93-526-LH)
(D. New Mexico)

ORDER AND JUDGEMENT*

Before McWILLIAMS, BARRETT and LOGAN, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Petitioner Robert Samuel Chappell appeals the dismissal of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Petitioner is a prisoner in the New Mexico state system serving a sentence, after jury trial, on convictions relating to the sale of unlicensed securities, including operating as an unlicensed broker-dealer, sales of unregistered securities, fraudulent securities practices, and fraud. On appeal petitioner alleges that the district court

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* This order and judgement is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgements; nevertheless, an order and judgement may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

erred in dismissing his petition for procedural default (based on failure to timely seek certiorari of the New Mexico Court of Appeals decision affirming most of the convictions) and in refusing to rule on the merits of his claim of alleged violation of the Interstate Agreement on Detainer (based on delay of his state trial beyond 120 days after he was brought into New Mexico). Petitioner makes various allegations of error in the state court proceedings; but it is clear that his attorney filed his petition for a writ of certiorari to the New Mexico Supreme Court out of time (albeit apparently by only one day) and the New Mexico Supreme Court found a procedural bar to ruling on the merits of petitioner's claims. That court applied the same procedural bar to deny relief on the postconviction proceedings.

The magistrate judge, whose Proposed Findings and Recommended Disposition filed October 4, 1993, were adopted by the district court, properly analyzed the issues and correctly applied the rule set out in Coleman v. Thompson, 501 U.S. 722 (1991), determining that petitioner has not shown cause and prejudice or a fundamental miscarriage of justice sufficient to justify a grant of relief. We can add little to its analysis, and therefore affirm the dismissal for substantially the reasons stated in the magistrate judge's recommended disposition.

Petitioner's motion for de novo review correctly notes the standard we apply to review the district court's dismissal order, and we therefore grant that portion of petitioner's motion. The petition for writ of mandamus is denied as moot. We have examined the items attached to petitioner's motion for acceptance of exhibits. While we find them to be interesting background, some of those items apparently were not in the record before the district court. Further, they are irrelevant to the determination of this appeal; they do not establish cause for petitioner's failure to file a timely appeal in the state court convictions and they do not establish a fundamental miscarriage of justice. Therefore, we deny the motion to accept those exhibits.

AFFIRMED.

The mandate shall issue forthwith.

Entered by the Court

James K. Logan
Circuit Judge

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
United States District C
Albuquerque, New Mex
NOV 2 199
Clerk

ROBERT SAMUEL CHAPPELL,
Petitioner,

vs. CIVIL NO. 93-526

LH/LFG

JOHN THOMAS, Warden
Respondent,

ORDER OF DISMISSAL

THIS MATTER came before the Court on the Magistrate Judge's proposed findings and recommended disposition and on Petitioner's objections to the proposed findings and recommended disposition. The Court conducted a de novo review of those portions of the Magistrate Judge's proposed findings and recommended disposition to which Petitioner objects.

IT IS HEREBY ORDERED that the proposed findings and recommended disposition of the United States Magistrate Judge are adopted by the Court.

IT IS FURTHER ORDERED that this action be, and it hereby is, dismissed with prejudice.

UNITED STATES DISTRICT JUDGE
RECEIVED NOV 8, 1993

"EXHIBIT D"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ROBERT SAMUEL CHAPPELL,
Petitioner,

vs. CIVIL NO. 93-526 LH/LFG

JOHN THOMAS, Warden,
Respondent.

MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION [1]

Proposed Findings

1. This is a proceeding on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Main Facility of the Penitentiary of New Mexico at Santa Fe, New Mexico, challenges the judgement and sentence of the Fifth Judicial District Court

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1. Within ten(10) days after a party is served with a copy of these proposed findings and recommendations, that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections to such proposed findings and recommendations. A party must file any objections within the ten-day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

entered in State v. Chappell, No. CR 88-110 FR (County of Lea, New Mexico). A jury found Petitioner guilty of unlicensed broker-dealer or sales, 27 counts, contrary to N.M.S.A. 1978 §§ 58-13-14 and 58-13-19; offer or sale of unregistered securities, 27 counts, contrary to N.M.S.A. 1978 § 58-13-4A; fraudulent securities practices, 21 counts, contrary to N.M.S.A. 1978 § 58-13-39; and fraud, 21 counts, contrary to N.M.S.A. 1978 § 30-16-6. (Answer, filed July 26, 1993, Exhibit (A).

2. This Court determines that an evidentiary hearing is not necessary as the matter can be resolved on the basis of the record.

3. "The Court has long held that state prisoners must exhaust state remedies before obtaining federal habeas relief." Keeney v. Tamayo-Reyes, ___ U.S. ___, 112 S.Ct. 1715, 1790 (1992). See generally, Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137 (10th Cir. 1988); see also, Wallace v. Duckworth, 7778 F2.d 1215 (7th Cir. 1985); Davis v. Wyrick, 766 F2.d 1197 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). "The

question with respect to exhaustion is not merely whether [Petitioner] has in the past presented his federal claim to the state courts, but also whether there is, under the law of the [state], any presently available state procedure for the determination of the merits of that claim." Thomas v. Wyrick, 622 F.2d 411, 413 (8th Cir. 1980). Respondent concedes, and this Court finds, that Petitioner exhausted available state remedies because he has no available state mechanism for obtaining review of his claims and the petition is properly before the Court.

Petitioner presents the following grounds for review:

(a) The Interstate Agreement on Detainer was grossly violated as follows: Article IV(c) in that trial was held 275 days after arrival in the receiving state. Good cause for the delay beyond 120 days was not shown in open court as required by the agreement. Petitioner's speedy trial right per Title 18 § 3164 and Rule 50 was thus violated after causing great prejudice to Petitioner. Thus, Petitioner was denied due process and equal protection in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) A pre-transfer hearing to which Petitioner was entitled has not been held for proving the lack of jurisdiction of the Lea County, New Mexico

Court over the subject matter, venue, and over the person. Petitioner could also have shown that charges in Lea County, New Mexico were made for the purpose of extorting money and not for actual criminal liability. Conflicts of state laws also deprived state of jurisdiction over subject matter covered by federal laws. Thus, Petitioner was denied due process and equal protection in violation of the Fourteenth Amendment of the Constitution of the United States.

(c) Efficient prosecution was promised, as required by I.A.D., but prosecution could not have been less efficient with numerous Constitutional and law violations as hereinafter set out, but not limited to the following, each of which provides a separate basis for granting relief:

(1) There was no evidence that a crime had been committed by either Petitioner or his company; thus, there was insufficient evidence to sustain a conviction. The District Court erred in denying Petitioner's motion for directed verdict as to all counts.

(2) The verdict of the jury was against the great weight and preponderance of the evidence.

(3) The District Court erred in denying Petitioner's motion for mistrial based upon prosecutorial misconduct: the guilty plea of another defendant was mentioned and used in

prosecution's opening statement.
(4) The court erred in admitting nonmarandized [sic] statements which were given without appointment of counsel.
(5) The prosecutor improperly commented upon Petitioner's right to remain silent.
(6) New Mexico violated the interstate agreement on detainer in its treatment of Petitioner.
(7) Petitioner received ineffective assistance of counsel since attorney waived and attempted to waive rights.
(8) The District Court erred in allowing the expert witness testimony which gave legal opinions and invaded the province of the jury as the finder of fact.
(9) The District Court should have declined to exercise jurisdiction over petitioner since the manner in which he was brought before the court and into the custody of the state should shock the conscience of the court.
(10) The Securities Act of New Mexico is unconstitutional as applied by the District Court.
(11) The District Court erred in instructing the jury; therefore, a new trial is mandated.
(12) Prosecutorial misconduct should bar a re-trial of the Petitioner under the double jeopardy clause.
(13) When taken in light of the evidence, the thirty-year sentence entered by the District Court

is excessive and should be set aside and/or reduced.

(14) Cumulative error requires reversal.

(15) New Mexico Court of Appeals found record inadequate for appeal.

(16) New Mexico Court of Appeals constructively found ineffective assistance of counsel by finding waiver of constitutional rights and failure to object at critical stages.

Petition, filed April 19, 1993, pp. 3-3a

4. Respondent moves this Court for an order dismissing the instant petition because the claims have been procedurally defaulted. Petitioner filed his response on August 4, 1993. Petitioner filed a Motion for Summary Judgment on September 8, 1993.

5. After being convicted in state district court, Petitioner appealed his conviction to the New Mexico Court of Appeals. See Answer, Exhibits B-H. The Court of Appeals reversed his conviction on counts 21 through 23 and 85 through 87, but affirmed on all the remaining counts. See Answer, Exhibit G. Petitioner did not file his petition for certiorari review within the appropriate time frame as provided in S.C.R.A. 1986, Rule 12-502(B)$_2$(1992 Repl. Pamp.)

6. The procedural default rule is an outgrowth of the "adequate and independent state ground" doctrine which was described by the

Court in Harris v. Reed, 489 U.S. 255, 260 (1989); Wainwright v. Sykes, 433 U.S. 72, 81-82 (1977). This doctrine provides that federal courts will not review the lawfulness of a person's custody by way of a petition for a writ of habeas corpus when that custody is the result of a judgment which rests on independent and adequate state ground. Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546 (1991). An example of an independent and adequate state ground is "when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." Coleman at 2554. The Court must, therefore, look to the last reasoned decision of the state court which considered the claims to determine if the failure to comply with a state procedural rule constitutes an adequate and

2. Rule 12-502(B) provides the time requirements for governing petitions for the issuance of writs of certioran seeking review of decisions of the Court of Appeals:

TIME. The petition for writ of certioran shall be filed with the supreme court clerk within twenty (20) days after final action by the court of appeals and served immediately on respondent. The petition shall be accompanied by the docket fee or a free process order. The three (3) day mailing period set forth in Rule 12-308 does not apply to the time limits set by this paragraph. Final action by the court of appeals shall be the filing of its decision with the court of appeals clerk unless timely motion for rehearing is filed, in which event final action shall be the disposition of the last motion for rehearing which was timely filed.

independent state ground. Id. at 2557; Ylst v. Nunnemaker, ___ U.S. ___, 111 S.Ct. 2590, 2595 (1991). However, "if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." Coleman, 111 S.Ct. at 2557 (footnote omitted).

7. In the case at bar, the Supreme Court relied on the state's procedural rule and this is considered an independent and adequate state ground. Consequently, Petitioner's claims are procedurally defaulted.

Notwithstanding that the claims are defaulted, in Petitioner is able to satisfy certain requirements, the Court may still entertain his claims. In Ballinger v. Kerby, No. 91-2230, 1993 WL 322415 (10th Cir. August 26, 1993), the Court described as follows the showing Petitioner must make:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate the

failure to consider the claims will result in fundamental miscarriage of justice. Coleman, 111 S.Ct. at 2565.

Petitioner's pro se status during the period in question does not exempt him from these requirements. Dulin, 957 F2.d at 760. To show cause, petitioner would have to demonstrate "that some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). "Objective factors that constitute cause include interference by officials that makes compliance with the state's procedural rule impracticable, and a showing that the factual or legal basis for the claim was not reasonably available to [petitioner]." McClesky v. Zant, 111 S.Ct. 1454, 1470 (1991)(internal quotations omitted).

To satisfy the prejudice prong, Petitioner must show "'not merely that errors at ...trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Murray, 477 U.S. at 494 (quoting from United States v. Frady, 456 U.S. 152, 170(1982)(emphasis in original).

Lastly, the Court may also consider the claims "if failure to do so would constitute a fundamental miscarriage of justice. This is an extremely narrow exception, implicated only in 'an

extraordinary case, where a constitutional violation has probably resulted inn the conviction of one who is actually innocent'" Ballinger, 1993 WL 322415 *4 (quoting from Murray, 477 U.S. at 496).

8. Petitioner submits that his petition arrived one day late via the United States mail. He represents that his attorney tried to fax the documents to New Mexico local counsel, but was told that they could not be faxed there; and that he also sought to fax the material to the Public Defender's office, but was told the fax had no ink. Petitioner claims he followed up on the status of his filing, but was told by the clerk of the court that his petition did not arrive the day before it was due or on the actual day it was due. In addition, he claims that he is innocent.

9. Petitioner's explanations for not filing his petition for discretionary review do not satisfy the cause requirement. The time limits set forth are mandatory. The request must be filed within twenty days. In fact, the rule explicitly states that the three-day mailing period does not apply. Petitioner knew that there was a twenty-day deadline and by mailing his petition, took the chance that it would arrive on the correct day. There is no set certainty as to when mail will be delivered. Petitioner took a gamble that the mail would arrive on the correct date. In this case, it did not. While this may seem a harsh result, to find otherwise would undermine the purpose of the

rule, to wit: to set a firm deadline so that there will be finality in judgments. Because Petitioner cannot satisfy the cause requirement, I need not consider the prejudice.

Despite being unable to show cause for his default, the Court nonetheless may still consider his claims if the failure to do so would result in a fundamental miscarriage of justice. Ballinger, 1993 WL 322415 *4. Having received the record, Petitioner cannot meet this standard. His conclusory protestations of his innocence do not affirmatively demonstrate his innocence.

Recommended Disposition

That Respondent's motion to dismiss be granted; that Petitioner's motion for summary judgment be denied; and that the petition be dismissed.

LORENZO F. GARCIA
United States Magistrate Judge

"EXHIBIT E"

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs. No. 12,677

ROBERT CHAPPELL,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF LEA COUNTY
Patrick J. Francoeur, District Judge

Tom Udall, Attorney General
Bill Primm, Assistant
Attorney General
Santa Fe, New Mexico Attorneys of Plaintiff

Robert J. Jacobs
Taos, New Mexico

Joe Alfred Izen, Jr.
Bellaire, Texas Attorneys for Defendant

MEMORANDUM OPINION

MINZNER, Judge.

Defendant appeals from his convictions on ninety-six counts relating to the sale of unlicensed securities, including fraud, fraudulent securities practices, sales of unregistered securities practices, sales of unregistered securities, and operating as an unlicensed broker, raising fourteen issues on appeal. We reverse Defendant's convictions on counts 21 through 23 and 85 through 87, and affirm his convictions on all other counts. We address in order the issues raised by Defendant on appeal.

ISSUES 1 AND 2

Defendant contends that there was insufficient evidence to support his convictions, and the trial court erred by failing to grant his motion for a directed verdict. Defendant also asks this court to order a new trial if we decline to reverse his convictions on all counts, because he believes that the jury's verdict is "against the great weight and preponderance of the evidence." Defendant primarily contends that the State failed to prove his individual connection with each sale, but rather improperly sought conviction on the basis of his former associate Norman Cowart's activities. Defendant specifically argues that he never directly participated in each sale and never willingly or actively participated in any representations made by his agent. Defendant argues that it was necessary for the State to prove that he was aware of Cowart's activities in

New Mexico and encouraged Cowart in carrying out Cowart's activities in order for the jury to return guilty verdicts on any count.

A review of the evidence shows that the State proved each of the essential elements applicable to the counts upon which Defendant was convicted, except counts 21 through 23 and counts 85 through 87. Cowart's testimony at trial establishes that Defendant was president of Nassau Life Insurance Co., Ltd. and Cowart was an information officer in the company. Cowart stated that he gave copies of Defendant's book, Secrets of Offshore Tax Haven, and Nassau Life annual reports to his clients to encourage them to invest in Defendant's products. Both the book and the annual reports contained claims that Defendant's company and its affiliates were good investments, and the book itself contained examples of documents used by Cowart to set up off-shore contractual companies for his clients.

Defendant was aware that Cowart was selling his products because they met in Nassau in 1985 and agreed that Cowart would continue to service existing clients Cowart had developed under his boss in Texas, attract and service new clients, and send the money to Defendant in Nassau, at the home office. Moreover, Defendant contacted Cowart numerous times over the phone to discuss how business was going and to specifically discuss sales of certain products and

the amount of money generated. Defendant knew what Cowart was selling, when he was selling, and to whom. Occasionally Defendant contacted Cowart's clients himself, to welcome them into the company and to verify information sent to Nassau Life. We review the evidence in the light most favorable to the trial court's decision. See State v. Lankford, 92 N.M. 1, 582 P.2d 378 (1978). So reviewed, the evidence shows that Defendant was aware of Cowart's activities in New Mexico and encouraged him in carrying out those activities.

Defendant also contends that the State failed to prove the requisite intent to support his conviction on the fraud counts. We disagree.

The State was required to prove that Defendant had the requisite specific intent to cheat or deceive to establish fraud. See State v. Gardner, 103 N.M. 320, 706 P.2d 862 (Ct. App. 1985). However, "[f]raudulent intent may be proven by reasonable inferences from a defendant's statements and conduct." Id. at 324, 706 P.2d at 866. The State produced evidence from which the jury was entitled to draw an inference that Defendant had the requisite specific intent to cheat or deceive.

Neither the crime of selling unregistered securities nor the crime of fraudulent securities practices requires proof of specific intent. State v. Ross, 104 N.M. 23, 715 P.2d 471 (Ct. App. 1986); State v. Sheets, 94 N.M. 356, 610 P.2d

760 (Ct. App. 1980); see also SCRA 1986, 14-4301, -4302 (Cum. Supp. 1991). With respect to the counts for sales of unregistered securities and fraudulent securities practices, the State was only required to prove that Defendant acted intentionally in that he was aware of what he was doing. State v. Shafer, 102 N.M. 629, 698 P.2d 902 (Ct. App. 1985). This it did.

Although Defendant does not complain of a failure of proof on specific counts, it is our responsibility to note fundamental error when there is insufficient evidence. State v. Doe, 92 N.M. 100, 583 P.2d 464 (1978). In measuring the sufficiency of the evidence, we use the instructions given as the yardstick. State v. Smith, 104 N.M. 729, 726 P2.d 883 (Ct. App. 1986). The instructions given on counts 21 through 23 and counts 85 through 87 are not supported by the evidence offered at trial.

The instructions given on counts 21 through 23 required the jury to find that the securities involved were Caribbean Express stock ant that the transactions occurred on or about January 9, 1986. The evidence at trial, however, showed that on January 9, 1986, Bartholomew signed two checks totalling $13,064 made payable to Nassau Life, indicating they were for "41/2% Project Aquila." Bartholomew testified that Project Aquila never got going and, after speaking with Defendant, she received a letter reflecting their

agreement. The letter from Defendant to Bartholomew dated February 27, 1986 stated that the $13,064 resulting from Project Aquila would be applied in two ways: $10,000 would be invested in a Guyanan oil venture, and $3,064 would be used to purchase Nassau Life shares.

Although Bartholomew also testified that she purchased shares of Caribbean Express stock from Cowart, she did not indicate the amount of her investment, where the funds came from, or the date she purchased the shares. The stock certificates introduced did not indicate the amount of the investment, the number of shares credited to her contractual company, or the date the stock was purchased. Cowart's testimony did not fill in the gaps in the evidence. There is therefore no link between the transaction date of January 9, 1986 charged in the instructions given on counts 21 through 23, and the Caribbean Express stock also listed in those instructions.

Similarly, the instructions given on counts 85 through 87 required the jury to find that the securities involved were Nassau Life shares and that the transaction occurred on or about January 29, 1987. The exhibits, however, indicate that the sale on January 29, 1987 was for Caribbean Express stock. The victim did not testify that she had purchased Nassau Life shares; rather, she identified the exhibits. Thus, the evidence offered

at trial does not support the instructions given on these counts.

Under these circumstances, the jury was not able to convicts on these counts without fragmenting the evidence to an unacceptable degree. Accordingly, Defendant's convictions on counts 21 through 23 and 85 through 87 must be reversed. See State v. Manus, 93 N.M. 95, 100-01, 597 P.2d 280, 285-86 (1979); see also Smith, 104 N.M. at 730, 726 P.2d at 884.

ISSUE 3

Defendant asserts that the trial court erred by refusing to grant a mistrial after the State's opening argument in which the State mentioned that Cowart had pled guilty to the same charges and was serving a prison sentence. Although the State failed to cite the record to support its argument, see SCRA 1986, 12-213(A)(3) (Cum. Supp. 1991), a review of the tapes supports the State's assertion that Defendant withdrew his objection to the improper statement in exchange for the dismissal of racketeering and conspiracy charges. The tapes indicate that Defendant was present at the bench conference and stated that he understood the agreement to waive the objection in consideration for the dismissal of the other two charges. Therefore, this issue was not preserved for appeal. See State v. Musgrave, 102 N.M. 148, 692 P.2d 534 (Ct. App. 1984) (by stating at trial that he did not want a mistrial,

defendant waived that relief and could not raise it on appeal).

ISSUE 4

Defendant argues that admission of his testimony from Cowart's sentencing hearing was erroneous because he was neither represented by counsel at the hearing nor advised of his rights prior to testifying. Defendant failed to object at his own trial to the admission of these tapes, but argues on appeal that the error was fundamental, and thus his failure to object should not prevent us from reaching the issue. See State v. Escamilla, 107 N.M. 510, 760 P.2d 1276 (1988).

We have previously held that a defendant is precluded from raising for the first time on appeal claims that evidence was inadmissible because he was not advised of his right to remain silent. see, e.g., State v. Gutierrrez, 82 N.M. 578, 484 P2.d 1288 (Ct. App. 1971) (defendant was in no position to complain of admission of officer's testimony, even if it would have been inadmissible, since he failed to object below and raised the argument for the first time on appeal). We see no reason to depart from that rule in this case.

Having reviewed the testimony at issue, it also appears that defense counsel may have made a tactical decision not to object, because the tapes could be viewed as being advantageous to Defendant. Defendant's testimony contained

statements that could be considered exculpatory. Defendant stated that he never intended to use Cowart in any way and that he viewed Cowart as the client's agent, not as an agent for his company. Defendant also strongly defended Nassau Life and its financial viability and appeared to sincerely believe that there was nothing wrong with what he had done. Under these circumstances, Defendant's reliance on the doctrine of fundamental error is misplaced. Cf. State v. Crislip, 110 N.M. 412, 796 P.2d 1108 (Ct. App. 1990) (fundamental error not present where it appeared that defense counsel made the tactical decision that tapes of prior testimony would be advantageous in the absence of live testimony).

ISSUE 5

Defendant claims that the State impermissibly commented on his right to remain silent in its closing argument. Defendant's counsel referred to Defendant's book numerous times in his closing argument and urged the jury to find that Defendant only intended to find a legitimate method to avoid paying taxes, saying that the book was just like Defendant's testimony. The State responded during rebuttal by saying that Defendant's book was not sworn testimony and that it could not be considered Defendant's testimony. The State restricted its argument to rebutting Defendant's suggestion that the book carried the same weight as testimony from

Defendant. This was not an impermissible comment on Defendant's failure to testify. See State v. Isiah, 109 N.M. 21, 781 P.2d 293 (1989) (context of state's remarks fails to support finding that remarks were of such character that the jury would naturally conclude them to be comment on defendant's right to remain silent). Rather, the State's remarks were made in response to Defendant's attempt to characterize his book as testimony. See State v. Henry, 101 N.M. 266, 681 P.2d 51 (1984) (defendant opened the door to prosecutor's comment).

ISSUE 6

Defendant contends that his case should be dismissed because the State violated the Interstate Agreement on Detainers (IAD), NMSA 1978, § 31-5-12 (Repl. Pamp. 1984), by failing to bring him to trial within 180 days of his notice of demand for a timely final disposition. However, a review of the record reveals that any objections Defendant made to trial delays were withdrawn. Defendant moved the trial court to extend the time for filing motions to ninety days, and at that month rule with Defendant. The court time the court instructed defense counsel to discuss the six offered to vacate other trials so that Defendant's trial could be set earlier. At that time, Defendant told the trial court that the September trial date was fine. Furthermore, after the trial date was set, Defendant requested an additional extension

of time. The record indicates that any objection to an alleged violation of the IAD was waived. Cf. Musgrave, 102 N.M. at 150, 692 P.2d at 536 (by stating at trial that he did not want a mistrial, defendant waived that relief and could not raise it on appeal). The continuance was properly granted. See State v. Alderete, 95 N.M. 691, 625 P.2d 1208 (Ct. App. 1980).

ISSUE 7

Defendant argues that he was denied effective assistance of counsel because he did not knowingly waive his rights under the IAD and because of numerous other errors he claims trial counsel made. To the extent that Defendant asserts generally that any waiver of rights or failure to object constituted ineffective assistance of counsel, he has not satisfied his burden on appeal. See State v. Rodriguez, 107 N.M. 611, 762 P.2d 898 (Ct. App. 1988). We address his specific contentions below.

The record reflects that Defendant knowingly waived his complex trial. We are not persuaded that the delay was prejudicial, and, in fact, it appears to have been to Defendant's advantage. Under these circumstances, Defendant has not shown either his attorney's incompetence or that his attorney's conduct prejudiced him. Both are required to support the claim of ineffective assistance of counsel. See State v. Talley, 103 N.M. 33, 702 P.2d 353 (Ct. App. 1985).

In his Reply Brief, Defendant makes other specific claims that he was denied effective assistance of counsel. For example, he asserts that the introduction of Cowart's convictions based on guilty pleas was ineffective assistance of counsel. This evidence was introduced by defense counsel during Cowart's cross-examination for purposes of impeachment pursuant to SCRA 1986, 11-609(A)(2). Its introduction does not establish a prima facie case that Defendant received ineffective assistance of counsel. The other specific claims of ineffective assistance of counsel are also insufficient to establish a prima facie case. In addition, this court has indicated that it will not consider an issue raised for the first time in a Reply Brief. See Jaramillo v. Fisher Controls Co., 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985). Under these circumstances, we are not persuaded that a remand is indicated. See State v. Stenz, 109 N.M. 536, 787 P.2d 455 (Ct. App. 1990) (failure to make a motion to suppress evidence is not ineffective assistance of counsel when the record does not support the motion to suppress; court declined to remand with respect to other claims of ineffective assistance).

ISSUE 8

The State called Royce Griffin, Special Counsel and Deputy Director of the New Mexico Securities Division, to testify as an expert witness. The trial court ruled prior to trial that Griffin could

testify about what is and what is not a security, but that he could not testify about what would constitute a violation of securities law.

At trial, Griffin provided general background on his job and on the nature of a security for purposes of state regulation. Without objection, he also testified that, to be subject to regulation, an activity in which someone invests must have substantial contact with New Mexico; he indicated that if an offer originates in New Mexico, it is within the scope of the governing statutes. He was also asked a hypothetical question involving a discussion in New Mexico about establishing an off-shore company that would then purchase stock; he was asked whether that situation would classify as an offer in New Mexico.

Defendant objected to this question on the ground that Griffin's testimony would invade the province of the jury. But cf. State v. Shade, 104 N.M. 710, 715, 726 P.2d 864, 869 (Ct. App. 1986) (former chief of New Mexico Securities Bureau testified that in his opinion time shares being sold were securities subject to regulation under state law); see also SCRA 1986, 11-704 ("Testimony in the form of an opinion ... is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). The objection was overruled.

Without objection, Griffin then testified about the nature of an annuity in general and whether it

is a security and about licensing requirements. He identified an exhibit prepared by the division director which indicated that Defendant was not registered as a broker-dealer, had not registered the items on which the counts were based, and had not requested an exemption. He also indentified State's Exhibit 4, one of the documents on which one of the counts was based, as a security.

Finally, Griffin was asked another hypothetical question, this time concerning the availability of a general exemption for purchases of stock in a hypothetical foreign corporation. Defendant objected to the question, and the trial court sustained the objection on the ground of relevancy. Probed on the availability of an exemption for purchases of stock in Nassau Life, one of the items on which some of the counts were based, Griffin testified that based on the documents he had reviewed, he knew of no available exemption. Defendant objected to the answer, and there was a bench conference that is inaudible on the trial tapes, but the objection was apparently overruled.

The objection made at trial that Griffin's testimony would invade the province of the jury has not been argued on appeal. The argument on appeal is that Griffin was allowed to testify to questions of law. No specific question or answer is identified by Defendant, and he has not

identified on appeal any particular testimony as prejudicial. We are not persuaded that the issue argued on appeal was preserved at trial, or that Defendant has identified reversible error.

To preserve an issue for appellate review, it is usually necessary to raise an issue with sufficient specificity that the trial court will have an opportunity to make a ruling and avoid error, see SCRA 1986, 12-216(A), and also to argue the same issue on appeal, indicating in what respect the ruling made was erroneous. See Blacker v. Uhaul Co., ___ N.M. ___, ___ P.2d ___ (Ct. App. 1992) (No. 12,563) (defendant failed to preserve issue regarding non-uniform jury instruction because it made a different argument in the trial court than the ones asserted on appeal). There is a presumption in favor of the proceedings below, and the party claiming error must be able to point clearly to it. Clayton v. Trotter, 110 N.M. 369, 796 P.2d 262 (Ct. App. 1990).

We recognize that New Mexico Life Insurance Guaranty Ass'n v. Quinn & Co., 111 N.M. 750, 809 P.2d 1278 (1991), indicates that the question of whether a particular arrangement is a security under the New Mexico Securities Act is a question of law. Nevertheless, the court did not decide in that case whether all of the related issues were legal questions in the context of a criminal proceeding, and the court indicated that presentation of facts and evidence may be

necessary to aid the trial court's resolution of the issue of what is or is not a security. Id. at 755, 809 P.2d at 1283. By allowing Griffin's expert testimony, the trial court implicitly ruled that expert testimony would be helpful to determine the issues of fact. The trial court specifically ruled that Griffin would not be allowed to testify about what would constitute a violation of securities law.

The record indicates that Griffin addressed himself to both questions of law and fact. Because Defendant does not contend on appeal that the specific rulings the trial court made were erroneous, we conclude that Defendant has not shown that the trial court committed reversible error in admitting Griffin's testimony.

ISSUE 9

Defendant asserts that the trial court should have declined jurisdiction because the manner in which he was brought into the state should shock the conscience to the court. We recently considered a similar issue in State v. Gibson, ___ N.M. ___, ___ P.2d ___ (Ct. App. 1991) (No. 12,472), and reach the same conclusion here. Defendant's brief fails to point out where he offered any evidence that the Bahamian nationals who took him out of the Bahamas and into the United States were acting as agents of the United States government, and it similarly fails to point out where he offered any evidence that the Bahamians' conduct was grossly cruel or

inhumane. See R. 12-213(A)(2) (allegations of fact in a brief are to be accompanied by references to the record or transcript). The trial court had no obligation to decline jurisdiction under these circumstances. See Gibson, ___ N.M. at ___, ___ P.2d at ___ (slip op. at 16).

ISSUE 10

Defendant argues that the New Mexico Securities Act is unconstitutional as it was applied to him because it criminalized foreign conduct that had little connection with the state. Because (1) all of the customers Defendant was accused of defrauding reside in New Mexico; (2) the customers were recruited into Defendant's scheme by Cowart, his accomplice in New Mexico; (3) the checks that paid for the investment products were all written on New Mexico bank accounts; and (4) each contractual company was headquartered in New Mexico, we disagree with Defendant's characterization of the evidence. There was substantial evidence that the prohibited transactions occurred in New Mexico.

ISSUE 11

Defendant asserts that the jury was improperly instructed. We have reviewed his arguments and conclude that they do not establish reversible error.

The jury was properly instructed on Defendant's individual liability arising from his actions as an officer of Nassau Life. The trial

court properly denied Defendant's requested instruction 3 because it related only to the corporation's potential liability, which was not an issue in the case. See State v. Gammill, 102 N.M. 652, 699 P.2d 125 (Ct. App. 1985).

The court also properly refused Defendant's requested instruction 4, which defined an independent contractor and stated that one who employs an independent contractor and stated that one who employs an independent contractor is not responsible for his acts or omissions. It is the Uniform Jury Instruction for a civil matter, and it does not properly state Defendant's potential criminal liability.

The Trial court gave the Uniform Jury Instruction on aiding and abetting, see SCRA 1986, 14-2822, as the law requires. See State v. Scott, 90 N.M. 256, 561 P.2d 1349 (Ct. App. 1977); see also NMSA 1978 § 30-1-13 (Repl. Pamp. 1984). Defendant's requested instruction 7, SCRA 1986, 14-2823, was also properly refused. This instruction is not necessary because the subject matter is covered in the essential elements instructions and because it could be considered a comment on the evidence, and the trial court did not err in refusing to give it. See id., Use Note. Moreover, the jury was adequately instructed that it had to find that Defendant intended that a crime be committed and acted intentionally when he committed the crime. The

instructions given were adequate to insure that the jury convicted Defendant based on his own intentions and not those of Cowart.

Defendant challenges the trial court's refusal to give his requested instruction on the definition of "investment advisor representative" and on exempt "broker-dealer." Although the jury does not appear to have been instructed on the definition of an "investment advisor representative" or exempt "broker-dealer," "sales representative," "investment advisor," exempt "investment advisor" and exempt "investment advisor representative." The first three terms were defined in instructions that follow the language of the New Mexico Securities Act of 1986 to the extent there was evidence to support them. NMSA 1978, § 58-13B-2(B), (L), (T) (Repl. Pamp. 1991). Defendant does not contend that the trial court followed the wrong statute in defining these terms; in fact, Defendant relied on the same statute in proposing the instructions he contends the court erroneously refused. Because there was no evidence that Defendant was under the supervision of an investment advisor, we are not persuaded that there was evidence to support the refused instructions.

Under these circumstances, we conclude that Defendant has not established reversible error in connection with the refused instructions. Furthermore, Defendant was not prejudiced by the

instructions that were given. We conclude that the instructions given on "broker-dealer," "sales representative," and "investment advisor" were sufficient to instruct the jury on the subjects they covered, because they followed the statute to the extent there was evidence to support them. State v. Jennings, 102 N.M. 89, 691 P.2d 882 (Ct. App. 1984).

Defendant also challenges the trial court's refusal to give his requested instruction concerning exempt securities for insurance companies. This instruction concerning exempt securities for insurance companies. This instruction was properly refused because there was no evidence that any securities were sold by or through an insurance company authorized to do business in New Mexico. Gammill, 102 N.M. at 655-56, 699 P.2d at 128-29. The jury was correctly instructed on the evidence concerning annuities as exempt securities.

ISSUES 12-14

Because we have held there was no reversible error, we do not address Defendant's argument that prosecutorial misconduct should bar retrial. We have also found that the evidence was sufficient to support Defendant's convictions except as to the counts we reverse. Therefore, the sentence imposed on the counts we affirm was in accordance with the law. See State v. Augustus, 97 N.M. 100, 637 P.2d 50 (Ct. App.

1981). There is no merit to Defendant's assertion that his sentence was excessive. Finally, Defendant contends that cumulative error on all issues requires reversal. Because no errors were found except as to the counts we reverse for insufficient evidence, the doctrine of cumulative error does not apply. State v. Lopez, 105 N.M. 538, 734 P.2d 778 (Ct. App. 1986), cert. denied, 479 U.S. 1092 (1987).

CONCLUSION

Defendant's convictions on counts 21 through 23 and 85 through 87 are reversed. The evidence failed to establish that the victims had purchased the particular securities on which these counts were based. His convictions on the remaining counts are affirmed. The case is remanded for entry of an amended judgment and sentence.

IT IS SO ORDERED.

PAMELA B. MINZNER, Judge

WE CONCUR:

THOMAS A. DONNELLY, Judge

LYNN PICKARD, Judge

"EXHIBIT E"

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
November 4, 1993

NO. 8000-01914

STATE OF NEW MEXICO,
Plaintiff-Appellee-Respondent,
vs.
ROBERT CHAPPELL,
Defendant-Appellant-Petitioner.

ORDER

This matter coming on for consideration by the Court upon petitioner's motion to accept the petition for writ of certiorari as timely filed, and the Court having considered the motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion hereby is GRANTED.

ss Kathleen Jo Gibson
Clerk of the Supreme Court
of the State of New Mexico

"EXHIBIT F"

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
November 4, 1993

NO. 8000-01914

STATE OF NEW MEXICO,
Plaintiff-Appellee-Respondent,

vs.

ROBERT CHAPPELL,
Defendant-Appellant-Petitioner.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered the petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari hereby is DENIED.

ss Kathleen Jo Gibson
Clerk of the Supreme Court
of the State of New Mexico